In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 110

THE ALTON RAILROAD COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLEES

No. 267

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLANTS

v.

THE ALTON RAILROAD COMPANY ET AL., APPELLEES

APPEAL AND CROSS APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the specially constituted District Court (R. 29) is reported in 36 F. Supp. 898. The

court's judgment and decree appear at R. 36. The report of the Interstate Commerce Commission (R. 8), hereinafter called the Commission, is reported in 8 M. C. C. 469.

JURISDICTION

The final decree of the District Court (R. 36) was entered April 7, 1941, and the appeal was allowed April 21, 1941 (R. 42). The cross appeal was allowed June 6, 1941 (R. 21). Probable jurisdiction of both the appeal and cross-appeal was noted October 13, 1941. The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; 28 U. S. C. Supp. III, secs. 45 and 47a) and section 238 of the Judicial Code as amended by the Act of February 12, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., sec. 345).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

QUESTIONS

The Commission, acting under the so-called "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (Part II of the Interstate Commerce Act) issued to appellee motor carrier a certificate of public convenience and necessity authorizing the continuance by it of operations as a common carrier in driveaway service of

new automotive vehicles and chassis over irregular routes from Detroit, Mich. to points in eleven designated States, and of rejected vehicles and chassis from any points in those States back to Detroit. The lower court, entertaining the suit brought by appellant railroads over objections questioning their standing to maintain it, upheld the certificate as in all respects valid "except as to operation in the State of Arkansas."

The questions presented in the appeal by the railroads from the lower court's decree insofar as it upholds the Commission's authorization of the carrier's operations are:

> (1) Whether the evidence supported the Commission's finding that the carrier had been in bona fide operation on the "grandfather" date and since that time to all points in any of the States named.
>
> (2) Whether the evidence supported the finding as to any points in certain of those States.
>
> (3) Whether the Commission, in authorizing the operations to all points in a State on evidence of actual shipments to a few points only, misconstrued the statute.
>
> (4) Whether the Commission erred in holding that the carrier's operations had been bona fide in certain territory despite its failure, alleged by appellants, to comply with certain laws in Oregon and Nebraska.

The questions presented on the cross-appeal are:

(1) Whether appellants had standing to maintain the suit.

(2) Whether the lower court's action in setting aside the Commission's authorization "as to operation in Arkansas," based upon a weighing of the evidence of its own, was not error.

STATEMENT

The appeal and cross-appeal herein are direct appeals from a final decree (R. 36) of the court below dismissing in part, and granting in part, a petition filed by the Alton Railroad Company and other railroads to enjoin and set aside an order entered by the Commission in a proceeding entitled *John P. Fleming Common Carrier Application*, No. MC 48654, 8 M. C. C. 469. The railroads are appellants in No. 110; the United States, the Commission and John P. Fleming, doing business as John P. Fleming Driveaway Service, are appellants in No. 267.

The Commission's order, or certificate (R. 17), authorized the continuance by the applicant motor carrier of operations as a common carrier in driveaway service of new automotive vehicles, finished and unfinished, and new automotive chassis from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington, on the other

hand, over irregular routes through the states of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming. As an incident to such operations, the certificate authorized the applicant to "transport to Detroit from any points in the States to which service is herein authorized, any new vehicle or chassis that has been rejected by a dealer or distributor."

The Commission proceeding, in which the order was entered, was instituted by application filed by the carrier February 12, 1936, under the so-called "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, asking authority to continue operation as a common carrier in driveaway service of automobiles, trucks, chassis, unfinished automobiles and all other automotive vehicles over irregular routes between points in States therein designated, including the eleven States first above named. Section 206 (a) provides that "no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway * * * unless there is in force, with respect to such carrier, a certificate of public convenience and necessity, issued by the Commission, authorizing such operations." This is subject to the proviso (the "grandfather" clause) to the effect that if any such carrier was in bona fide operation on June 1, 1935, "over the route or routes or within the territory for which application is made," and has so operated since that time, except

as to interruptions over which it has no control, the Commission shall issue such certificate without requiring further proof of public convenience and necessity. Pending determination of the application the applicant is authorized to continue operations. Section 208 (a) provides that the certificate issued under section 206 (a) shall specify the service to be rendered, and "in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate."

The Public Service Commission of Missouri intervened in opposition to the granting of the application. The Railroad Commission of Texas protested the granting of the application, but was not represented at the hearing. National Automobile Transporters Association, Automobile Contract Carriers Association, and International Harvester Company intervened and presented testimony on questions relating to jurisdiction. Numerous motor carriers of automobile vehicles, individuals, Nicholson Universal Steamship Company, Detroit-Cleveland Navigation Company and Central Freight Association, western, and southern rail lines, and numerous railroads entered appearances at the hearing, but did not present any evidence (R. 10). A hearing was held before a Commission examiner, in which a number of protestants participated, including most of the railroads, appellants herein. A considerable volume of evidence, both oral and documentary, was re-

ceived. A proposed report was prepared by the examiner, to which the railroads and other protestants excepted and filed exceptions and brief. In January 1938 the exceptions to the examiner's report were orally argued before Division 5 of the Commission, and on September 19, 1938, the Division made its report and order, granting the application to the extent of authorizing the operations above described and denying it except to the extent so granted.

The authority conferred limited the transportation to new vehicles, finished or unfinished, and new chassis, and limited the operation to transportation from the one origin point, Detroit, except that new vehicles or chassis, rejected by dealers or distributors at points in the destination States were authorized to be transported back to Detroit. Concerning the limitations the report reads:

> "It also appears from the testimony that applicant transported used cars in interstate commerce between various points in the States covered by the application. Transportation of this character is not supported by documentary evidence, and the oral testimony does not warrant the conclusion that it was other than sporadic or that applicant was regularly engaged in such transportation. Certain new cars were returned to Detroit for various reasons. The return of vehicles refused by distributor or dealer would appear to be a necessary incident to the business in which applicant is engaged."

The application, as covering operations to points in the States of New York and Pennsylvania, was denied because the evidence of operations on and subsequent to June 1, 1935, was considered inadequate "to establish a valid claim to grandfather rights" with respect to such States (R. 16); and, as covering points in Michigan, was denied except as to Detroit, the originating point of the traffic.

By the "driveaway" method of operations, the transportation is performed (1) by individual driving of the vehicle under its own power, (2) by driving one vehicle under its own power and towing a second and (3) by driving one vihicle under its own power and upon which another vehicle is partially (front wheels) or wholly mounted, or combinations of both (R. 10). While certain parties contended at the hearing that these methods of conveying the traffic did not constitute transportation within the jurisdiction conferred by the Act, they abandoned the contention after issuance of the Examiner's report. The Commission, however, considered it to be desirable to discuss the question briefly and said:

> "* * * As indicated below, no question appears to exist, so far as towing of a vehicle is concerned. The dictionary definition, in a limited sense, however, leaves the impression that 'transportation' may be something other than the movement of an automotive vehicle under its own power.

Corpus Juris defines 'transporting' as follows:

> As commonly understood, one is transporting an article when he is conveying it from one place to another. Transporting includes towing.

In their interpretation of federal statutes making transportation of a stolen motor vehicle, in interstate commerce, a criminal offense, the courts have uniformly held in sustaining convictions that driving of the vehicle under its own power is transportation. See *Whitaker* v. *Hitt*, 285 F. 797, *Hostetter* v. *United States*, 16 F. (2d) 921, and *Piper* v. *Bingamon*, 12 F. Supp. 755. We conclude that the methods followed by an applicant in conveying the vehicles from one place to another constitute transportation within the meaning of the act. It makes no difference whether certain vehicles are towed by other vehicles or whether all operate on their own power.

Under Part I, we have consistently regarded the movement over other than the owning railroad of locomotives under their own power as transportation. Tariff rates for such transportation are provided by rail carriers, and in certain instances we have approved a basis of rates therefor. See *Investigation and Suspension Docket No. 23*, 21 I. C. C. 103, and *Locomotives from and to the South*, 211 I. C. C. 114." (R. 11).[1]

[1] The transportation of vehicles of transportation (cars moving on their own wheels) was considered in *Louisville*

The motor carrier, in conducting its operations into or through the States involved, is shown to have proceeded in recognition of State law. Answering the contention of the protesting railroads that it had failed to obtain certificates from the States, the Commission said:

> "Applicant, however, made inquiry as to certificate requirements of the States and he testified that, to the best of his information, certificates were not required, with one or two exceptions. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, and Arkansas were introduced and applicant holds certain permits issued by the States of Oregon and Nebraska" (R. 14).

The carrier's operations in a few States, notably Missouri, presented some particular circumstances, but nothing that could warrant a finding different than the finding made by the Commission that the carrier had been engaged in bona fide operation into, or through, those States.

& Nashville R. R. et al. v. United States (Private Passenger, or Office, Car Case), 282 U. S. 740; reviewing *In re Use of Private Passenger Train Cars*, 155 I. C. C. 775; 786-789.

The Driveaway method is generally used together with truckaway service (R. 70).

Historical Discussion, Examiner's Report, R. 69, 70.

Other cases involving applications for Driveaway authorizations are: *D. L. Wortena, Inc., Common Carrier Application*, 4 M. C. C. 619, 620; *Caravans, Inc., Com. Car. Application*, 9 M. C. C. 659; *Fugate & Girton Driveaway Co., Inc.*, 27 M. C. C. 623; *Myers Com. Car. Application*, 23 M. C. C. 451; *Barnett's, Inc., Com. Car. Application*, 22 M. M. C. 663.

In granting to the motor carrier authority to serve all points in a State, although operations during the "grandfather" period had been to a limited number of distribution points in the State, the Commission took into consideration the highly specialized nature and characteristics of the particular transportation service, the type of operation engaged in, the infrequency of demands of consignees, and especially the fact that distribution points are constantly being "shifted." The Commission said: "Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206 (a) of the Act * * *" (R. 13).

Following the issuance by the Commission, Division 5, of the report and certificate, September 19, 1938, the railroad interveners filed a petition for reargument and reconsideration by the entire Commission; this was denied December 5, 1938. Subsequently, after the decision of this Court in *McDonald* v. *Thompson*, 305 U. S. 263 (R. 4), the said railroads filed a supplemental petition for reargument and reconsideration by the entire Commission, which was denied March 6, 1939 (R. 4).

Proceedings in the Lower Court

The petition, asking that the Commission's certificate be enjoined and set aside was filed July 14, 1939, by numerous railroads, including those which were interveners in the Commission proceeding. (R. 4.) The defendants, the United States, the Commission, and the motor carrier filed answers to the petition (R. 18, 22), which answers included the affirmative defense that the plaintiff railroads were without standing to institute and maintain the suit. November 26, 1940, the hearing before the specially constituted three-judge court was held at Detroit, Michigan, at which hearing a certified copy of the record made before the Commission was introduced in evidence and the case was orally argued and submitted for decision. January 31, 1941, the court rendered its opinion in which, after holding that the plaintiff railroads had standing to bring and maintain the suit, it held that the certificate of the Commission authorizing the motor carrier operations was valid "except as to operations in Arkansas." April 7, 1941, the court entered its final decree setting aside the Commission's certificate as to such operations in Arkansas and dismissing the petition in other respects.

Specification of Errors—Cross Appeal

1. The lower court erred in holding that the interest of appellant railroads as competitors of appellee motor carrier clothed them with the right to bring and maintain the suit.

2. The lower court erred in holding that appellee motor carrier had abandoned its "operation as to Arkansas" and in basing its supporting conclusion upon its own weighing of the evidence.

SUMMARY OF ARGUMENT

I. Appellant railroads rest their right to maintain this suit to enjoin the authority granted appellee motor carrier to continue his operations upon the interest of certain of them as competitors and upon the fact that they were interveners in the Commission proceeding. Their interest in being protected from the competition of transportation service, different in kind from the service for which they are soliciting traffic and which appellee has been rendering for shippers since prior to June 1, 1935, is an interest of tenuous substance to clothe them with the right to sue to enjoin the certificate authorizing the continued rendering thereof. And they could not, by merely intervening in the Commission proceeding, vest themselves with such right.

An interest in being protected from competition, amounting of itself to a right to sue to restrain such competition, has to be found in statutory law. Under the Interstate Commerce Act shippers, whose only interest in an order of the Commission is that it relieves their competitors of a rate disadvantage or deprives them of an advantage, are not entitled to maintain independent suits to set aside the order. *Sprout & Son v. United States*,

281 U. S. 249. However, under the "construction and abandonment provisions" (Sec. 1 (18)–(22)) of Part I of the Act, relating to railroads, railroads may be enjoined from undertaking the extension of their lines without Commission authority in suits brought by "any party in interest" (Sec. 1 (20)), which phrase has been held to include competing railroads and other carriers if the proposed extension would bring about a material change in the transportation situation affecting their particular interests. *Western Pacific R. R. v. Southern Pacific Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382. And this special interest entitling such carriers to bring suits to enjoin extensions, if undertaken without the Commission authority, applies to give like permission to bring suits to enjoin a Commission certificate granting such authority on grounds attacking its validity. *Claiborne-Annapolis Ferry Co. Case, supra.*

In the present suit to enjoin the Commission's certificate granting appellee motor carrier authority to continue his operations, the appellant railroads rely, for their standing to maintain it, upon the same provision in section 1 (20) of Part I, contending that it should be read together with section 205 (g) of Part II of the Act, relating to motor carriers, which latter provision reads in part: "Any final order made under this part shall be subject to the same right of relief in court

by any party in interest as is now provided in respect to orders of the Commission under Part I * * *." However, it would appear that this section was not intended by Congress to confer any substantive statutory right, but rather was designed as a procedural measure to govern suits by parties in interest to protect such independent substantive rights as they might possess. Accordingly, the right granted by section 1 (20) should not be held incorporated by analogy into section 205 (g). This view of the nature of section 205 (g) is supported by the fact that the Motor Carrier Act contains a substantive provision (section 222) giving the Commission alone the right to an injunction against wholly unauthorized operations of a motor carrier. By implication, parties in interest such as appellants would be excluded from this right. If, then, they may not enjoin unauthorized motor carrier operations where no certificate of authority has been issued by the Commission, it is altogether unlikely that Congress in enacting section 205 (g) intended thereby to give appellant railroads standing to enjoin the operation of an allegedly void certificate of authority.

Moreover, the difference in type of service being rendered by Fleming as a motor carrier of vehicles from the kind of service performed by appellant railroads is such that the latter should not be considered as competitors having sufficient interest to qualify as "parties in interest" within

the meaning of the statute as interpreted by this Court. The appellants would not, by the enjoining of appellee motor carrier's service of a kind different from that for which they are soliciting traffic, be bettering their competitive situation materially, if at all, if there were other operations of the kind in the field; and if there were none, could not themselves furnish the public with service of the kind that they would shut off. And, aside from the question as to whether appellants' interest in competing transportation service of a kind different from their railroad service supplies standing to maintain suits to enjoin certificates authorizing *proposed* undertakings of such service, there is the further question as to whether such competitive interest could, in any event, supply standing to maintain suits to enjoin certificates giving the sanction required by the "grandfather" clause, not to new, but to existing operations, and which moreover, might frequently have been established in the competitive field and the use of the public for many years prior to the grandfather date. Decisions of this Court sustaining the right of carriers to sue to enjoin *proposed* extension of operation, or to enjoin certificates authorizing such operations, where such new operations would bring about a material change in the transportation situation affecting their particular interests (*Western Pacific R. R.* v. *Southern Pacific Co., supra; Claiborne-Annapolis Ferry Case, supra*) afford no support for appellants' standing to maintain this suit to bring about

a change in the transportation situation, for the purpose of advancing their competitive interests.

I. That the appellants are not clothed with the right to maintain this suit by reason alone of their intervention in the Commission proceeding is settled by decisions of this Court. *Sprunt & Son* v. *United States, supra; Pittsburgh & West Va. Ry.* v. *United States*, 281 U. S. 479, 486.

II. The Commission's certificate authorizing continuance of the operations of appellee motor carrier (hereinafter called Fleming) from Detroit to all points in the States therein named is fully supported by the evidence.

The appellants contend (Br. 22) that the shipments transported by Fleming into the States named prior to the "grandfather" date had been (1) too limited in number to show bona fide engagement in the service to *any* points in certain of the States and (2) that they had been too limited as to destination points to show bona fide engagement in the service to *all* points in any of the States. In developing this contention in their brief the appellants refer to cases in which the Commission denied in whole or in part the applications of general commodity carriers for "grandfather" rights to operate *between* all points in large territories, apparently advancing such cases as controlling the Commission's judgment with respect to the operations in the instant case which, as limited to the transportation of a single product from a single origin point, were inherently characterized by breaks

in service and infrequency of the demands of consignees.

The Commission, in acting upon Fleming's application excluded from its authorization certain States to which Fleming claimed to have been operating because of inadequacy of evidence; and it also excluded operations covered by the application which were of an entirely different character from those authorized. The application was not confined to operations from Detroit to the States named but, as made, covered operations *between* points in the States named, this being in part to enable operations in the transportation of used cars and in part to enable operations in the transportation of newly manufactured automobiles from any origin point furnishing such traffic. The authority, as granted, was limited to the transportation of new automotive vehicles and chassis and to operations from the one origin point, Detroit. As thus limited, Fleming is confined to operations in which the evidence showed he was established with regularity, namely, operations limited to the transportation of a single product from a single origin point, manufacturing the same, to States in which he had done business.

Shipments to most of the States were shown to have been numerous on and prior to the "grandfather" date, although the destination points in no State exceeded seven. In certain of the States Fleming had not commenced operations until 1935, and the shipments to these States prior to the

"grandfather" date were to few destination points and small in amount, although in "fair volume" in view of the nature of Fleming's traffic and his special service. The Commission gave particular consideration to the limited transportation that had been performed in these States, recognizing that it raised a serious question as to whether its scope warranted authorization of operations to all points in the States. In granting the authority, the Commission referred to cases of other special types of motor carriers, such as carriers of household goods and of oil field supplies, serving a large territory over irregular routes, to which it had uniformly granted authority to operate to many points to which actual shipments had not been carried. It referred to the fact that in the case of the general commodity hauler it did not require proof by actual shipments of each and every commodity carried, and it quoted from one of its decisions showing that the consideration governing the question was "whether there has been operation within the 'grandfather' period consistent with the holding out in the natural and normal course of business." In addition the Commission gave special consideration to evidence showing that Fleming's operations were highly specialized, reflecting the marketing characteristics of the product he carried and the intermittent demands of consignees for his particular service in carrying those products. Especially important considerations were the facts that Fleming as a practical

matter was limited to deliveries at points where the automobile manufacturer maintained distribution facilities and that, since such distribution points were shown to be constantly "shifted" and subject to rapid decrease, or increase, in volume of sales, his operations could not be confined to the specific points to which actual shipments had moved.

Section 206 (a), Part II of the Act, pursuant to which Fleming's application was filed, provides that certificates shall be issued "if any such carrier or predecessor in interest was in bona fide operation * * * over the route or routes or within the territory for which application is made * * *." In the instant case Fleming's operations were not operations over regular routes between fixed termini, but were operations entitling him to a certificate for irregular-route operations. The appellants assert that the Commission's construction of section 206 (a) has given that section substantially the same meaning as if the phrase "within the territory for which application is made" had been written "anywhere-for-hire," and they set out certain legislative history, based upon which, they argue that the phrase in question was not intended to authorize such operations but was intended instead to limit applicants operating over irregular routes "to their actual operations, the precise territory they were serving during the 'grandfather' period" (Br. 47). The Government agrees that the statutory grant

of the "grandfather" clause does not extend so far as to entitle a carrier to a certificate authorizing anywhere-for-hire operations on the basis only of the carrier's alleged ability and willingness to perform anywhere-for-hire service. On the other hand, it is the Government's view that the clause does not restrict a carrier with mathematical exactitude to the continued service of only those points in fact visited by the carrier on and since the "grandfather" date. Rather, the Commission is entrusted with reasonable administrative judgment in inquiring into and determining the "territory" within which an applicant operated on and after June 1, 1935. We think that in the instant case the Commission's authorization to Fleming to operate from Detroit to points in a specified group of States differs radically from an authorization to operate anywhere-for-hire; Fleming had in fact made deliveries in all of the States named in the certificate. That the authorization should extend to *all* points in those States appears supported by the record and by the peculiar conditions prevailing in the business of carrying new motor vehicles and chassis.

The appellants' further contention (Br. 41) that the Commission, in authorizing Fleming's operations to all points in the States named in its certificate, construed the word "territory" to mean State, appears to be an effort to change the case from one resting upon facts and judgment to a case con-

trolled only by statutory construction. The Commission did not, of course, construe the word "territory" to mean State. Its action is best described as a using of the boundaries of the States named in the application (1) in determining whether Fleming had been, as alleged in his application, engaged in operating to all points within them, and (2) in defining the areas within which he was authorized to continue such operations. This conformed, of course, with the statute, and the evidence fully supports the Commission's finding that Fleming was in bona fide operation from Detroit, on the one hand, to all points in the State named in the certificate.

As above shown, the Commission was governed by the fact that Fleming's operations, as limited to the transportation of the products of a single industry, reflected the marketing characteristics of the industry in his service. He was, as a practical matter, confined to shipments to the distributing points of the manufacturers which were shown to be constantly shifted and subject to rapid decrease and increase in volume of sales. Fleming's actual shipments, then, were only superficially representative of the substance of his transportation—carrying new motor vehicles from the manufacturer to a distribution center in a distant State, which center would serve as the purchasing market for the surrounding area. A change in point of distribution from one city to another in

the same area would not materially alter the service Fleming rendered in that area. The Commission accorded weight to the carrier's holding out to the public, concerning his service, in delimiting the area of authorized operations; we think this was a reasonable and proper consideration in view of the particular facts of Fleming's type of case.

III. The question as to whether Fleming's operations on and after the "grandfather" date were conducted in good faith is one committed to the Commission for determination and finding. The appellants' allegations, however, that the Commission *erred in holding* that Fleming was in bona fide operation despite "intentional" violation of the laws (or regulations) of two States, in effect, are allegations that it should have construed those laws and acted accordingly.

The record shows that Fleming's operations were carried on for the genuine purpose of serving the public and that in State after State he made inquiries as to the applicable laws, purchased caravan permits and paid taxes and other fees. While the Commission did not attempt to do what appellants urge that it should have done, it gave full consideration to the contentions of appellants (R. 14) and to the whole record. The case is not one of operating without authority in defiance of State laws. Fleming's operations showed a purpose to observe State law and such noncompliance

as there may have been is aptly characterized by the lower court as inadvertent, temporary, or technical. The following statement of the lower court sums up the whole situation (R. 55):

> Fleming's operations were in recognition of state law, and his applications to state authority and his inquiries as to the requirements of the several States were obviously so considered by the Commission. In any event there is no evidence that the inquiries were not pursued in good faith or that he had been excluded from any state by local administrative authority.

IV. The lower court's decree setting aside the Commission's certificate as to operation in Arkansas rests upon the statement in its opinion that (R. 33) "The record discloses that Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that State his operations had been abandoned. *United States* v. *Maher*, 307 U. S. 148." Fleming's testimony directly relating to his operations in Arkansas appears to have been limited to a statement as to a special fee paid (R. 86) and a statement with respect to his business in Arkansas at the time of the hearing which is not clear (R. 103); those statements, however, do not exclusively support the lower court's conclusion of abandonment. Nor is that conclusion indisputably established by the fact that Fleming's last shipment was made a little over

a year prior to the hearing, in view of the fact that Fleming's operations were shown to be specially characterized by breaks in service and intermittent demands of consignees.

The action of the court below in weighing the evidence for itself and setting aside the Commission's determination on the question of abandonment was error.

ARGUMENT

I. Appellant railroads are without standing to maintain the suit

The appellants are railroads operating throughout the country and carrying by means of tracks and cars all kinds of freight, including automobiles, to all parts of the United States. The appellee motor carrier's operations are restricted to the transportation of automobiles and chassis by the "driveaway" method earlier described, which differs substantially from appellants' railway service.

The appellants rest their right to maintain the suit on section 205 (g) of the Motor Carrier Act in conjunction with section 1 (20) of the Interstate Commerce Act. The Government, however, takes the position that standing is not so conferred upon them; that they must base their suit on a statutory right of relief since no independent equitable right is available, and that no such statutory right of relief exists; that the fact of appellants' interven-

tion in the proceedings before the Commission does not of itself give them standing to sue.

1. Appellants have no right to secure an injunction aside from statutory grant

Competition is for the most part a force of recognized good and, consequently, an interest in being protected from it amounting to a right to maintain suits, has to be found in statutory law. *Western Pacific R. R. Co.* v *Southern Pac. Co.*, 284 U. S. 47, 51. In suits to set aside orders of the Commission, the question as to whether a competitive interest supplied standing to maintain them first came up in connection with shippers. In *Edward Hines, Trustee*, v. *United States*, 263 U. S. 143, shippers, whose real interest in an order abolishing certain penalty charges exacted for the detention of cars was because it relieved competing shippers from paying the penalty, were held to be without standing to maintain a suit to set aside the order as beyond the Commission's authority. In *Sprunt & Son* v. *United States*, 281 U. S. 249, involving a suit to set aside a Commission order which had, by requiring a readjustment of rates, deprived appellants of a rate advantage previously enjoyed, this Court said at pages 254, 255:

> "The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference. We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate

> differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under section 3 of the Interstate Commerce Act, for their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. * * *"

Subsequently, in a suit brought by one railroad to set aside a certificate, issued by the Commission under section 1 (18) to (20) of the Interstate Commerce Act, authorizing another railroad to extend its line of railroad, a lower court dismissed the bill on the ground, *inter alia*, that the plaintiff railroad was without standing to maintain the suit, for the reason that, while it undoubtedly had an interest in preventing intrusion by a competitor into a district it was exclusively serving, that interest alone did not give it a right to sue to set aside the per-

mission given the competitor to do so. (Citing the *Sprunt Case, supra*), *Pennsylvania R. R.* v. *United States et al.*, 40 F. (2d) 921.

Decisions of this Court show that a wrong application was made in the above case of the decisions in the *Hines Case* and *Sprunt Case, supra* (*Chesapeake & Ohio R. R.* v. *United States*, 283 U. S. 35; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382), but this was because of special authority given by the "construction and abondonment" provisions of the Act[2] to "any party in interest" to bring suits to enjoin unauthorized extensions of lines and the direct relation between those suits and suits under the Urgent Deficiencies Act to enjoin the Commission's authorization of any such extension of lines. In the *Claiborne-Annapolis Ferry Case, supra*, question was raised as to the ferry company's standing to maintain a suit to set aside a certificate issued by the Commission authorizing the Chesapeake Beach

[2] Sec. 1 (18)-(22), Interstate Commerce Act, Part I. These provisions were added to the Act by Transportation Act, 1920, 41 Stat. 456, 477, 478. Cf. *Texas & Pac. Ry.* v. *Gulf, Colo. & S. F. Ry.*, 270 U. S. 266. Paragraph (18) forbids the extension, etc., of a line of railroad without a Commission certificate of public convenience and necessity. Paragraph (19) prescribes the manner of application to the Commission for an issuance of certificate. Paragraph (20) provides, among other things, that any construction without a certificate pursuant to paragraph (18) may be enjoined at the suit of the United States, the Commission, any Commission or regulating body of the State or States affected, or "any party in interest."

Railway to extend its line of railroad by ferry service from Chesapeake Beach across the Bay to a point in Dorchester County, Maryland. The Ferry Company operated a ferry over a route about 20 miles north. The local business, or general ferry business, that the railroad ferry might absorb seems to have been its chief concern. The decision, after stating that the bill disclosed that the proposed and permitted action might directly and adversely affect the ferry company's welfare by changing the transportation situation, states at pages 391, 392:

> "The right of appellant Ferry Company to institute and maintain this proceeding rests wholly upon the permission granted by paragraph 20, section 1. 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. In the absence of such certificate the doing of any of these things is declared to be unlawful—a crime subject to punishment by fine and imprisonment. And the permission is to apply to the court for an order to arrest the unlawful undertaking. The inhibition applies where there is no certificate in fact, or where the Commission lacked power to grant the outstanding one because of insufficient evidence to support its findings or other reason. An invalid certificate would leave the situation as though

none had issued. *Chicago, R. I. & P. Ry. v. United States*, 274 U. S. 29."

2. Appellants had no statutory right as alleged

It will be seen that the above emphasizes that the standing of the Ferry Company to maintain the suit to enjoin the Commission's certificate authorizing the extension of line rested wholly upon the permission granted to "any party in interest" by section 1 (20), Part I of the Act, to enjoin any such extension where undertaken by a railroad without authority. In the instant suit to enjoin the Commission's authorization of appellee's motor carrier operations, the appellants rely, for their standing to maintain it, upon the same provisions in section 1 (20) of Part I, contending that they should be read together with section 205 (g) of the Motor Carrier Act, Part II of the Interstate Commerce Act, which latter provisions read in part:

> "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I * * *."

It is the view of appellees that to interpret section 205 (g) as incorporating by reference substantive rights analogous to those conferred by section 1 (20) would be erroneous. Rather, section 205 (g) should be regarded as a procedural provision giving to parties in interest who possess independent substantive rights the same form of

judicial remedy which is granted to them in Part I of the Act in certain situations. The Motor Carrier Act, in section 222, contains substantive injunction provisions analogous to those of section 1 (20). Section 222 (b), Part II of the Act provides in part:

> "If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof) * * * or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to a United States District Court 'for the enforcement of such provision * * * and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise * * *'."

The Commission, then, may sue to enjoin unauthorized operations by a motor carrier, where no certificate of authority has been issued by it; however, the omission of the statute to mention "parties in interest" as similarly entitled leads to the conclusion that they have no standing to secure an injunction against a carrier which is operating in excess of or without a certificate of public convenience and necessity issued under either section 206 or section 207. It is plain that section 205 (g) could confer upon them no such right, because that section applies only to review of a final order of the

Commission. It would be entirely anomalous under those circumstances if section 205 (g) were held, nevertheless, to give "parties in interest" the right to enjoin operation pursuant to a certificate on the ground that the authorization is invalid. A proper interpretation of section 205 (g) requires, therefore, that a party in interest base his suit for injunction on a substantive right independent of section 205 (g). As pointed out earlier, where the interest is only that of freedom from competition not authorized by the applicable regulatory statute, the right to relief by a complainant must be founded on statute.

Moreover, narrowing consideration down to the substance of appellants' interest in having the Commission's authorization of appellee's "drive-away" operations enjoined: it is, as above stated, an interest in being protected from the competition of transportation service, different in kind from the service for which they are soliciting traffic,[1] and which appellee has been engaged in, and rendering for shippers, since prior to June 1, 1935. Such an interest is plainly not the same thing as the competitive interest which appellants have in preventing the extension of operations by other railroads into fields which they are already supplying with

[1] In the *Chihuahua-Annapolis Ferry Case*, *supra*, the ferry company's concern was because of the local, or general ferry, business that the railroad's ferry might absorb. So far as this business was concerned, the ferry company and the ferry "extension" would be carriers of the same kind.

transportation service of railroad kind. It is settled that this latter interest gives appellant railroads standing to sue to enjoin the undertaking of unauthorized extensions of operations by rival railroads, or, if authorized, to sue to set aside the authorization; but it does not follow from this that they have like standing to maintain a suit, such as this, to enjoin transportation service of different kind than that for which they are soliciting traffic. In the instant case of appellee's "driveaway operations" and in other cases of operations distinctly different from the railroad service appellants are able to offer to shippers, appellants would not, by the enjoining of such operations, be bettering their competitive position materially, if there were other operations of the kind in the field; and, if there were none, could not themselves furnish the public with service of the kind that they would shut off.

Furthermore, aside from the question as to whether appellants' competitive interest in transportation service of a different kind than the railroad service for which they are soliciting traffic, would supply standing to maintain suits to enjoin certificates authorizing *proposed* undertakings of such service, there is the question as to whether such competitive interest could, in any event, supply standing to maintain suits to enjoin certificates giving the sanction required by the "grandfather" clause, not to new, but to existing operations, and which, moreover, might frequently have been established in the competitive field and use by the public

for many years prior even to the "grandfather" date. In the "construction and abandonment" paragraphs of Part I there is no provision corresponding to the "grandfather" clause. Since the railroads were subject to regulation when the said paragraphs were enacted, they were not required to obtain Commission authority for their existing operations and there was, therefore, no occasion for a "grandfather" proviso. The prohibition running against the railroads is that they shall not undertake the extension of their lines, or operations, unless and until they shall have first obtained the Commission's authority. Accordingly, the certificates issued under Part I grant authority for *proposed* extensions of lines, or operations, and suits by the railroads to set aside such authority have the purpose of preventing new undertakings "threatening" invasion of their fields and not of enjoining operations over existing lines competing with their own.

As above shown, section 206 (a) of Part II not only requires the Commission's authority for new motor carrier operations but also for operations which were established prior to the Motor Carrier Act, such authority in the latter case, however, being given upon showing simply that the operations were so established and since continuously engaged in and without requirement of further proof of "public convenience and necessity." The Act thus gives recognition to the rights of carriers in established and existing operations and only

requires proof of those rights for its authority to continue the operations. There is a fundamental difference between a Commission certificate evidencing such rights and one authorizing new operations and newly found to be required by public convenience and necessity, and particularly is this so in any consideration of the standing of other carriers to sue, simply as competitors, to set aside the certificate by attacking such rights.

The standing of appellant railroads to maintain this suit finds no support in the decisions of this Court sustaining the right of the railroads to sue to set aside certificates authorizing proposed competitive extensions of lines, or to sue to enjoin unauthorized construction of competing lines newly undertaken. Even in such suits, a competitive interest supplies standing only as the railroads are able to show that the proposed, or new, extension of lines, or operations, will bring about a material change in the transportation situation directly affecting their particular interests. *Western Pacific R. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47; *Singer & Sons* v. *Union Pacific R. R. Co.*, 311 U. S. 295. In the instant suit to set aside the Commission's certificate authorizing the continuance of operations under "grandfather" right, the appellants are not suing to prevent a change in the transportation situation but to enjoin an allegedly erroneous determination of what the motor carrier transportation situation was on and after June 1, 1935.

3. Appellants' intervention in the Commission proceeding did not carry with it the right to maintain the suit

Appellants asserted in the lower court that they had standing to maintain the suit on either the ground of their competitive interest or the ground of their intervention in the Commission proceeding. The appellants themselves illustrate the results to which this position would lead for the reason that, while they are interveners, most of them are railroads whose location is such (R. 2, 4) that they could not have a competitive interest in appellee's motor carrier operations; their interest, therefore, consists simply of a desire to obtain the court's opinion as to the validity of the Commission's order.

Appellants refer to the fact that by virtue of a provision in Part II all the provisions of section 17 of Part I are made to apply to motor carrier proceedings including subdivision (9) of said section 17 of Part I (49 U. S. C., sec. 17 (9)) which provides:

> "(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration, otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or

> requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

The above provision was added to section 17 of Part I by Transportation Act, 1940 (54 Stat. 916) which was not enacted until after the Commission proceeding and instituting of the suit in the court below (R. 3), but it is, in any event, patent that the provision does not, and is not intended to, extend standing to bring suits to parties, in addition to those who had such standing prior to its enactment. The substance of the provision is to the effect that, after the applications for rehearing, or reconsideration, are disposed of by the Commission, suits may be brought "*under* those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise." This, it is plain, makes no change in the existing statutes for review of Commission orders. The purpose is to require parties to obtain final administrative action before resorting to the courts and not to give standing to bring such suits to parties not otherwise having such standing.

For their position that their intervention in the Commission proceeding, in and of itself, gives them standing to maintain the suit, appellants also rely on the *Chicago Junction Case*, 264 U. S. 258, and a lower court case *(Consolidated Freightways, Inc.*

v. *United States*, 34 F. Supp. 576) which sustained the right of a motor carrier to sue to set aside a certificate authorizing the proposed operations of another such carrier. The Commission's order involved in the *Chicago Junction Case*, *supra*, was one entered primarily (p. 262) under section 5 (2)[4] of the Act and authorized the New York Central to acquire control of the Chicago Junction Railway, a terminal railroad over whose tracks the railroads, plaintiffs in the suit, as well as the Central, gained access to the Chicago stockyards. In determining the question of the plaintiffs' standing to maintain the suit, the decision gives consideration not only to the fact of their intervention in the Commission proceeding, but also to the facts that the order substituted the control of the one railroad for the former neutral control and was shown to have already worked heavy irreparable damage to the plaintiffs and was continuing to subject them to like loss. "This loss," the decision states, "is not the incident of more effective competition * * *. It is injury inflicted by denying the plaintiffs equality of treatment * * *." (Pp. 266, 267.)

In the later *Sprout Case*, *supra* (281 U. S. 249), in which it was held that the plaintiffs did not have standing to maintain a suit to set aside an order which deprived them of a competitive advan-

[4] Section 5 (2) (41 Stat. 456, 481) included provisions not contained in section 5 (2), as amended (54 Stat. 905) in which it is now embodied.

tage, the Court said of their competitive interest (p. 255):

> "* * * Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. * * *."

In other decisions following the above case it has been similarly held that the fact that a party was permitted to intervene before the Commission did not, of itself, give it standing to maintain a suit under the Urgent Deficiencies Act. *Pittsburgh & West Virginia Ry.* v. *United States*, 281 U. S. 479, 486; *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119. In the *Claiborne-Annapolis Ferry Case*, *supra*, the fact of the ferry company's active intervention in the Commission proceeding is shown not to have been, of itself, enough to supply it with standing to maintain the suit, the Court's holding being, as above stated, that the right of

the ferry company to bring and maintain the suit "rests wholly upon the permission granted by paragraph 20, section I."

II. The Commission's order authorizing the appellee motor carrier's operations from Detroit to any points in the States therein named and the incidental return operations is supported by the evidence

Appellant railroads' first ground for their charge of invalidity against the Commission's order is that its authorization of the operations of appellee motor carrier (hereinafter called Fleming) from Detroit to any points in the States therein named is not supported by the evidence. The appellants do not apparently contend that Fleming had not transported shipments into the States named prior to the "grandfather" date; their contention appears to be that the shipments transported by Fleming before and after that date were (1) too limited in number to show bona fide engagement in the service to *any* points in certain of the States and (2) that they were too limited as to destination points to show bona fide engagement in the service to *all* points in any of the States. (Br. 22.) In developing this contention, or argument, in their brief, the appellants give little, if any, consideration to the special characteristics of Fleming's service as contrasted with carrier service for which there is more general and steady demand.

As shown by the Commission's report and evidence (R. 11, 92–96, 109–118) Fleming had commenced operations early in the year 1933, from which time to July 1936 he had transported or participated in transporting more than 2,100 vehicles, the shipments consisting of from 1 to 16 vehicles, although shipments of 2 to 4 vehicles exceeded shipments of other quantities. The number of points served prior to the "grandfather" date varied from one point in each of the States of Arkansas and Alabama to seven points in Georgia. Numerous shipments were transported to the points served prior to the "grandfather" date except for points in States in which operations were not started until 1935. As to these, the Commission report states "It appears, however, that by June 1, 1935 (the "grandfather" date) a fair volume of traffic had been moved. The three shipments to Arkansas aggregated 25 vehicles; four shipments to Texas aggregated 14 vehicles; four shipments to Oregon aggregated 24 vehicles; and five shipments to Washington aggregated 28 vehicles." (R. 13.) During the year between the "grandfather" date and the date of the hearing, July 23, 1936, Fleming's continued operations to the latter States[5] was evidenced by shipments to each of them except Arkansas (R. 92, 110). Shipments to Texas increased in number (R. 95, 117). Shipments to the other

[5] California, R. 93, 102; Oregon, R. 94, 114; [illegible]01; Washton, R. 96, 118; Texas, R. 95, 117.

States named in the Commission's certificate continued with some variation upward or downward.

The Commission, in acting upon Fleming's application, excluded from its authorization certain States to which Fleming claimed to have operated on the ground that the evidence was inadequate to support the claim and it also excluded operations covered by the application which were of an entirely different character from those authorized. The application was not confined to operations from Detroit to points in the States named, but, as made, covered operations *between* points in the States named; and it appears that this was in part for the purpose of obtaining authority to continue operations which Fleming had been conducting in transporting used cars between various points in the States named in his application (R. 11, 12). The Commission excluded "transportation of this character" from its authorization because the evidence did not "warrant the conclusion that it was other than sporadic or that applicant was regularly engaged therein." It limited the authority granted to transportation of new automotive vehicles and chassis and to operations from the one point, Detroit, where the traffic originated.

These operations of Fleming had to be considered from the standpoint that he was established in rendering the service from the origin point, Detroit, and that his operations would naturally take on characteristics conforming to the particular needs

of the industry whose products he moved.[6] The fact that, as to the points noted and other points, the shipments carried by him were few and separated, or varying in frequency, could not be taken as establishing that Fleming was no longer bona fide engaged in transportation to those points, if that was not the reasonable conclusion to be drawn therefrom, in view of the marketing characteristics of the industry and the fact that his service was not one for which there was steady demand. The fact, too, that Fleming's operations, as evidenced by shipments transported prior to the "grandfather" date, were shown to have been conducted to certain points in a State only, could not be taken to establish that the operations he was bona fide engaged in were confined to those points, if such a conclusion would be in conflict with the real character of his operations made necessary by the marketing characteristics of the industry whose products he moved.

Referring to the fact that the evidence of shipments to certain States showed few shipments and few points served, the Commission said in its report (R. 13, 14):

> "It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all

[6] The particular marketing characteristics of the industry as reflected in Fleming's service are shown at several points in the record (R. 50, 51, 54, 76, 84, 108).

of the States served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specific points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which the automobile manufacturers have established distribution facilities; a manufacturer could not, for many reasons, appoint an indefinite number of dealers or distributors for a given territory.

* * * * *

"As basis for authority to serve all points in a State, applicant points out that distribution points are constantly shifted from the standpoint of a State-wide area, dealers' accounts are changed, and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206 (a) of the Act, the provisions of which require in substance

that the authority granted shall permit a carrier to conduct the bona fide operations it was conducting on June 1, 1935. In *Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594, we said that:

'In the case of a common carrier of household goods or of oil-field supplies, serving a large territory over irregular routes, we grant certificates under the "grandfather" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "grandfather" certificates to haul general commodities that each and every commodity within that description has actually been hauled. The question is whether there has been operation within the "grandfather" period consistent with the holding out in the natural and normal course of business.'

* * * * *

* * * Applicant's service, according to our view, was necessarily confined to deliveries at a very few points, and future opportunities of obtaining traffic, no doubt, will be likewise limited. This is true, even though applicant has at all times held his services out to the public generally."

In the succeeding paragraph, the Commission, in discussing the question as to whether Fleming was a common, or contract, carrier (not in issue here), stated that the evidence indicated that the business performed was obtained by solicitation of dealers and distributors engaged in marketing the vehicles;

that Fleming would transport for anyone requesting him to do so; and that he held himself out to transport between any points in the States for which the application was made (R. 14). Later in the report the Commission said (R. 15, 16):

> "Protestants' principal arguments are directed to questions of whether applicant may serve all the points in the States for which application is made; whether, in view of infrequent service to various points in the States claimed, certain rights were not thereby abandoned; and whether applicant should or should not be limited to the particular routes from Detroit to key points in the territory actually served, deliveries thereafter to be made over irregular routes. In deciding these questions, it is also necessary to take into consideration the type of operation, frequency of the demand of the consignees for which the carrier performs transportation services, and the nature of the industry served. The record is convincing that the applicant's operations have been, and will continue to be, irregular in nature because of conditions under which he may secure traffic. The same proof with respect to territory served that might be required of a general commodity hauler, therefore, cannot be imposed, nor can operations be confined within the same definite limits. Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington,

> such restrictions apparently would not be in accordance with the operations performed on the statutory date. The fixing of specific termini would also prevent his rendering the type of service he has been performing."

The statements and findings of the Commission contained in the above quotations from the report supply an entirely sound basis in fact and reason for its conclusion that Fleming was entitled to a certificate authorizing irregular route operations to all points in the States named in the certificate issued to him.

Section 206 (a) of the Motor Carrier Act, pursuant to which Fleming's application was filed, provides that certificates shall be issued "if any such carrier or predecessor in interest was in bona fide operation * * * over the route or routes or within the territory for which application is made * * *." Section 208 (a) of the Act provides that "any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which the fixed termini, if any, between which and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate * * *."

In the instant case Fleming's operations were not regular-route operations between fixed termini but were operations entitling him to a certificate for irregular-route operations, that is, operations

not restricted either to regular routes or to fixed destination points. The Commission had found, as above shown, that, because of the conditions under which Fleming had to obtain traffic, his operations had been, and would continue to be, irregular in nature; that he could not be restricted to fixed routes without handicapping his business; and that the fixing of specific termini would prevent his rendering the type of service he had been performing. Based upon these findings and the findings and reasons earlier given in its report, the Commission made its concluding finding that Fleming had been engaged on June 1, 1935, and since that time "in bona fide operation as a common carrier * * * of new automotive vehicles * * * from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas * * * and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois * * * and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation" (R. 16, 17).

The appellants assert (Br. 42–47) that "the Commission's construction of section 206 (a) has given that section substantially the same meaning as if the phrase "within the territory for which application is made" had been written "anywhere-for-hire," and they set out certain legislative history, based upon which, they argue that the phrase in question was not intended to authorize such

operations.[7] Since they reach the conclusion that it was intended "instead to limit applicants not operating over regular routes nor between fixed termini to their actual operations, the precise territory they were serving during the 'grandfather' period * * *" (Br. 47), it is apparent that the misconstruction of the statute with which the appellants charge the Commission was its failure to limit the operations which it authorized Fleming to continue to operations touching the precise points in fact served by him. While agreeing that the statutory term "territory" does not comprise the scope of anywhere-for-hire transportation, we do not think that the "grandfather" clause can properly be interpreted as freezing a carrier's operations fast to the precise trips in fact made by him prior to the administrative hearing before the Commission; such a result is in conflict with even the literal language of the clause: that refers to operation on and since June 1, 1935, and there is every probability that no carrier will have made after the "grandfather" date the identical trips made approximately at that date. It is only possible to conclude that the Congress has conferred on the Commission some latitude of judgment to determine whether on particular facts a carrier's application falls within the statute's provisions;

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[7] The appellants do not define the anywhere-for-hire operations to which they refer. Compare *United States v. Maher*, 307 U. S. 148.

under such circumstances the Commission's determination of the extent of Fleming's bona fide operation ought not to be disturbed if warranted in the record. See Brief for the Petitioners, *Gray* v. *Powell*, No. 18, this Term, pp. 11–13, 15–25. A review of the evidence in the present case discloses ample support for the Commission's findings. It is clear that the Commission has not authorized anywhere-for-hire operations by Fleming, but has restricted him to a continuation of the service he has been substantially performing in the named States.

The appellants' further contention (Br. 41, 42) that the Commission, in authorizing Fleming's operations to all points in the States named in its certificate, construed the word "territory" to mean State, seems also an effort to change the case from one resting upon facts and judgment to a case controlled by statutory construction. The Commission did not, of course, construe the word "territory" to mean State. Its action is best described as a using of the boundaries of States named in the application (1) in determining whether Fleming had been, as alleged in his application, bona fide engaged in operating to all points within them, and (2) in defining the areas within which he was authorized to continue such operations. This conformed, of course, with the statute, and the evidence and findings fully supported the certificate issued to Fleming authorizing continuance of

his operations as a common carrier of new automotive vehicles and chassis "from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas * * *, on the other hand, over irregular routes * * *." As above mentioned, such certificate effected a denial in part of Fleming's application by limiting the authority granted to the transportation of *new* automotive vehicles and to operations from the single origin point, Detroit, which supplied the traffic (R. 9, 11). The operations authorized, therefore, were strictly of a kind that were wholly dependent for traffic upon one industry, reflecting that fact in the few points to which shipments had been carried and their intermittent character, and necessitating consideration of the special character of Fleming's operations as essentially operations that had to be responsive to the marketing characteristics of the industry.

The circumstances in the latter connection which the Commission particularly emphasizes are that Fleming was, as a practical matter, "limited to shipments to points at which the automobile manufacturers" maintained distribution facilities (R. 13), and that, since such distribution points were constantly "shifted" and subject to rapid decrease, or increase, in volume of sales, his operations could not be confined to the specific points to which shipments had in fact moved. (R. 14.) This situation, the Commission said in its report, made manifest that it must take into consideration

the character of a transportation service when issuing a certificate under section 206 (a) of the Act; and it thereafter quoted from one of its decisions (*Reliance Trucking Co. Contract Carrier Application*, 4 M. C. C. 594) showing that in cases of common carriers of household goods or of oil field supplies, serving large territories over irregular routes, it granted "certificates under the 'grandfather' clause permitting operations to many points to which no freight had actually been carried," and further showing that the consideration which it regarded as governing was "whether there has been operation during the 'grandfather' period consistent with the holding out in the natural and normal course of business." Giving effect to this consideration, or principle, as laid down, it will be seen that the holding out in natural and normal course of business coupled with operation consistent in the circumstances with the holding out is the criterion. Judged by the application of the principle in the cases of carriers of household goods or of oil field supplies, such carriers' holding out covered "many points to which no freight had actually been carried." Their holding out to serve those points, however, was one entirely in the natural and normal course of business in view of the special characteristics of their transportation services.

The Commission's report points to its action, authorizing operation by carriers of such kind to all points in a large territory, as precedent for its action upon Fleming's application (R. 13, 14). It

was of the view that Fleming's "deliveries" would continue to be made to a very few points although, as stated by it "applicant has at all times held his services out to the public generally" [*] (R. 14). In its discussion in the succeeding paragraph of the question as to whether Fleming was a common, or contract, carrier, the Commission emphasizes the general character of this "holding out" by its statement that Fleming "would transport for anyone requesting him to do so; that he held himself out to transport by driveaway method between any points in the States for which application is made * * *" (R. 14).

As above mentioned, the application made by Fleming was for authorization of operations within State boundaries, that is, for authorization of operations to all points in the States named in the application. Even aside from the characteristics of Fleming's service, the situation he was in in offering it to the public, arising from the fact that it was a service limited to the transportation of the products of a single industry (R. 14), supplied strong ground for giving full effect to his testimony that he was holding that service out to all points

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[*] In *Kenosha Auto Transport Corp. Common Carrier Application*, 24 M. C. C. 753, 757 (Driveaway) it was said:

"Applicant's service was necessarily confined, because of the type of commodities transported, to a very few points compared to the large territory sought, and future operations will be likewise limited. Moreover, applicant has always held itself out to serve any and all points in the States claimed."

in the States." With Fleming established in the rendering of his service of transporting new automobiles at Detroit, the point originating the traffic, his holding out of that service, limited to the transportation of one product from the one origin point, to States in which he had done business is a holding out of substance and weight. Coupling this with the characteristics of Fleming's service which showed that those points alone to which actual shipments were made were not truly representative of the points embraced in his real business and operations, it is apparent that Fleming's holding out to points not in fact served had to be given great weight and that it, together with actual services performed, fully supported the Commission's findings that Fleming was bona fide engaged in operation to all points in the States named in the Commission's certificate.

The appellants (Br. 32, 38), attempting apparently to show that the Commission was inconsistent in granting Fleming's application for "grand-

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"In *Eucalyptus Wood Co., Common Carrier Application*, 16 M. C. C. 468, 472, it was said:

"For these reasons and because of the specialized nature of the service, we have consistently held that not only the services actually performed during the 'grandfather' period but also the holding out to serve any point within the territorial scope of the applicants' operations must be considered. See *Greer Common Carrier Application*, 3 M. C. C. 483; *Union City Transfer Common Carrier Application*, 7 M. C. C. 717; *J. Norman Geipe, Inc., Common Carrier Application*, 1 M. C. C. 693; *L. C. Jones Trucking Co. Common Carrier Application*, 9 M. C. C. 740; *Miller Common Carrier Application*, 10 M. C. C. 15."

father" rights in this case, refer to a number of cases in which it denied to general commodity carriers an authorization comparable to that given Fleming, where the showing of actual shipments was essentially similar to that in this case. The Commission's report on Fleming's application sets out (R. 14) the consideration[10] which it regards as governing the disposition to be made in cases of special type carriers as contrasted with carriers of general commodities; those considerations have been emphasized in this brief. We think that they afford a sufficient basis for the distinction in treatment long made by the Commission, with respect to the importance of holding out, in passing on the claims of the general commodity and special type carriers.[11]

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[10] See *Eucalyptus Wood Co. Common Carrier Application*, 16 M. C. C. 468, 473.

[11] In *United States* v. *Carolina Freight Carriers Association*, No. 197, this Term, a carrier applied for "grandfather" authority to transport general commodities between any points in a number of eastern seaboard States. The Commission found that the carrier had been engaged in transporting only a small number of specific commodities, and, despite allegations of the carrier's holding out with respect to territory, limited the authorization of the certificate geographically to operations between points and areas in fact substantially served on and after the "grandfather" date. The Commission did not there accord to the applicant's representations the weight which it has given to Fleming's holding out in the present case. While the Carolina Corporation was found not to be a general commodity carrier, its type of business nevertheless differs greatly from that of Fleming, with the result that the Commission's different treatment of the two cases in regard to holding out seems thoroughly justified.

III. The Commission's determination that Fleming's operations were conducted in good faith was within its statutory authority and was fully supported by the record

1. The question as to whether operations on and after the "grandfather" date have been conducted in good faith is one committed to the Commission for determination and finding

The appellants advance as further ground for the setting aside of the Commission's certificate that it erred in holding Fleming to be in *bona fide* operation in certain territory despite his noncompliance with certain regulatory and licensing laws (Br. 35). The record shows that Fleming's operations were carried on for the genuine purpose of serving the public and that in State after State he made inquiries as to the applicable laws and requirements, purchased "caravan" permits and paid taxes and other fees (R. 85, 86). As said by the lower court "Fleming's operations were in recognition of state law and his inquiries as to the requirements of the several States were obviously so considered by the Commission" (R. 35). However, the appellants term the noncompliance of Fleming to which they refer "intentional violation of law," and their allegation that the Commission *erred in holding* Fleming to be in bona fide operation despite such violation of law is in effect an allegation that the Commission should have held that the laws in question had been intentionally violated by Fleming and have denied his application on that ground.

The Act places with the Commission the duty of finding whether or not an applicant for a "grandfather" certificate was "in *bona fide* operation * * * on June 1, 1935, * * * and has so operated since that time * * *" (Sec. 206 (a).) In *United States et al. v. Maher*, 307 U. S. 148, the Court said (pp. 153–154):

> "* * * But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes * * within the territory for which application was made and has so operated since that time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission. The legal issues presented by this record are relatively simple once the somewhat confused operations of the appellee's business are clearly defined."

The above statement of this Court brings out the fact that, in "grandfather" cases the finding that

a carrier was engaged in bona fide operation takes the place of the usual public convenience and necessity finding. But, to the extent that the finding is discussed, its administrative character is fully recognized. All of the Commission's fact finding and judgment on the facts and circumstances in situations before it would seem to be embodied in this ultimate finding of bona fide operations. The extent to which it expects that the Commission shall give consideration to *facts* showing that an applicant's operations have been carried on in nonrecognition of State laws is one thing, but the consideration of State laws requiring legal determinations, such as appellants in effect assert is the Commission's duty, or action upon such laws that would be beyond the administrative field, is an entirely different thing. The Commission's legal determinations even of the laws administered by it are not final. They may lead up to, or be incidental to, such finding of bona fide operation but they cannot be embodied in the finding itself, the making of which is committed to the Commission. The Commission makes many legal, or quasi judicial, determinations but it would seem that except for its determination of reparation, any legal determinations go to its authority to take action in any case and, therefore, would not be committed to it as determinations entering into the findings upon which the action rests in its character of administrative action. This is best illustrated by this

Court's decision in *Texas & Pac. Ry.* v. *G., C. & Santa Fe Ry.*, 270 U. S. 266, which involved a suit brought by the Texas & Pacific under section 1 (20) of the Interstate Commerce Act to enjoin the Santa Fe from constructing a short extension of its lines into the industrial section of Dallas, Texas, without having first obtained the Commission's authority pursuant to section 1 (18). The District Court granted the injunction, its decree was reversed by order of the Circuit Court of Appeals and the appeal to this Court was taken from that order. The Santa Fe had made objection to the District Court's jurisdiction and renewed the objection on the appeal. Its answer to the bill asserted that its proposed line was merely industrial track excepted by section 1 (22) from the extensions for which the Commission's authority was required (Pp. 270, 271). This defense raised the question whether the projected line constituted an extension within the meaning of section 1 (18); and the Santa Fe contended that it was one which Congress had by implication committed to the prior determination of the Commission along with the authority conferred upon it to determine whether an extension was compatible with the public interest, and that, since the Texas & Pacific had not obtained a determination by the Commission that the projected track constituted an extension, the District Court was without

jurisdiction over the suit. Speaking of this argument, the decision reads (p. 272):

> "To this argument the provisions of the Act afford a complete answer. Paragraph 18 prohibits the construction of an extension without obtaining the certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate and provide the method of proceeding. Whenever such an application is made the Commission may pass *incidentally* upon the question whether what is called an extension is in fact such; for if it proves to be only an industrial track, the Commission must decline on that ground to issue a certificate. * * *
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> * * * The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. * * *"

The finding of bona fide operation is not quasi legislative but this, of course, does not remove it from the field of administrative judgment on facts.

Piedmont & Northern Ry. v. *United States*, 286 U. S. 469, and *United States* v. *Idaho*, 298 U. S. 105, involved cases in which the Commission passed incidentally upon like questions under section 1 (18)–(22) as necessary to determine its authority

to proceed with its administrative action and findings. In the latter case its authorization of the abandonment of certain track found to be in the public interest was set aside on the ground, distinct from its administrative finding, that it had been wrong in holding that the track constituted an extension.

Of course, the *Texas & Pacific Case*, *supra*, indicates quite plainly that the particular reason why questions as to the character of trackage, or operations, arising under section 1 (18)–(22) are legal questions for the court is because they are made so by the statute. Such questions, of themselves, are particularly suited for determination by the Commission. In fact the determination of questions of just such kind, even as establishing the jurisdiction of another tribunal, may be properly committed to the Commission. *Shields* v. *Utah-Idaho Cent. R. R.*, 305 U. S. 177. And, as for questions of such kind being determinative of the Commission's own jurisdiction, it may be said that there are a good many questions as to the character of trackage, or operations, which are essentially administrative determinations and, as such, quite commonly enter into its ultimate jurisdictional findings upon which its administrative action rests.[12]

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[12] These determinations, however, are more inherently matter of administrative judgment because they are only guided by the very general definition of "transportation" and "railroad" contained in section 1 (3) of the Act, coupled with

However, questions as to the character of trackage under section 1 (18)–(22) are, as held by the Court, questions which are shown to be legal by those paragraphs, and, as such, the Commission's determination could not be embodied in the ultimate administrative finding. However and whenever made they would be legal determination subject, as such, to complete review by the Courts. *United States* v. *Idaho, supra.* The application of this to appellants' contention that the Commission erred in not holding that Fleming intentionally violated the laws of Oregon and Nebraska, and, therefore, erred in holding that he was in bona fide operation, is that the Commission has no judicial powers even with respect to the statutes which it administers, and plainly has none with respect to the laws of the States. Even if such a determination could be said to be quasi-judicial and incidental to the Commission's ultimate finding of bona

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particular provisions of the Act to be applied. Nevertheless, there is no reason why the determination of questions as to the character of the trackage, or operations, exempted by section 1 (22) from the requirement to obtain authority for new construction, or extensions, could not have been committed to the Commission, if Congress had so desired. And, if that had been done, any such determinations would have been embodied in its ultimate administrative finding of public convenience and necessity. There would be a statutory standard of exemption applied, but one so very broad and general (*Piedmont & Northern R. R.* v. *Int. Com. Comm.* 286 U. S. 299) that it could be committed to the Commission without trenching upon the field of legal interpretation.

fide operation, problems as to court review are apparent.

The appellants rely upon this Court's decision in *McDonald* v. *Thompson,* 305 U. S. 263, but there is nothing in the action taken in that case, or that was said in the opinion, that supports their views. The case was one of alleged supersedure of the State statute, brought to the Court in the usual way. The instant case is one for the review of a Commission certificate and it is not a case of operating without authority in defiance of State laws. The lower court, speaking of this Court's decision in *McDonald* v. *Thompson,* said (R. 34) that it—

> "* * * holds that the expression 'in bona fide operation' suggests 'absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire'. It then reaches the conclusion that, 'plainly the proviso does not extend to one operating as a common carrier on the public highways of the state in defiance of its laws'."

Later the lower court, after discussing the decision in its application to this case, said (R. 55):

> "* * * Fleming's operations were in recognition of State law, and his applications to State authority and his inquiries as to the requirements of the several States

were obviously so considered by the Commission. In any event there is no evidence that his inquiries were not pursued in good faith or that he had been excluded from any State by local administrative authority."

2. The Commission's findings establish Fleming to have been in bona fide operation

The facts relating to Fleming's operations included in the Commission's record—his growing business, his satisfactory returns, his safety record, his large tax and license fee payments, his freedom from prosecution for violation of State regulatory laws—taken together, clearly support the Commission's finding that Fleming was in bona fide operation. Its underlying finding reads (R. 14):

> "Protesting rail carriers contend that applicant's operations were not bona fide in character, because he failed to procure certificates from the States through or into which he conducted operations. Applicant, however, made inquiry as to certificate requirements of the States and he testified that, to the best of his information, certificates were not required, with one or two exceptions. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, Kansas, and Arkansas were introduced and applicant holds certain permits issued by the States of Oregon and Nebraska."

The lower court's statement (R. 35) that Fleming's operations were in recognition of law and that

there was nothing to show that his inquiries were not pursued in good faith or that he had been excluded from any State by local administrative authority accurately reflects the record.

IV. The District Court erred in setting aside the Commission's order with respect to operations in Arkansas

The District Court in holding that the Commission improperly authorized Fleming to operate from Detroit to all points in the State of Arkansas gave as its reason in modifying the certificate accordingly:

> The record discloses that Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that state his operations had been abandoned. *U. S.* v. *Maher,* 307 U. S. 148. (R. 33.)

Arkansas was one of four States in which Fleming did not commence operations until 1935. Concerning those operations the Commission stated in its report (R. 13):

> It appears, however, that by June 1, 1935, a fair volume of traffic had moved.

The Commission's finding that Fleming had been in bona fide operation to points in Arkansas on June 1, 1935, is fully sustained by the evidence contained in exhibits filed by Fleming with the Commission (R. 92, 110); during the months of March, April, and May, 1935, Fleming moved [illegible]

vehicles to Texarkana, Ark. The issue here between appellants and appellees is whether Fleming's operations into Arkansas were subsequently abandoned.[13] Fleming's direct testimony on this aspect of the case, referred to by the District Court in its opinion (R. 33) is not clear. He said at the hearing (July 23, 1936):

> In Arkansas we have one place in Texarkana but we do not serve any other dealers in the state and were not in 1935. (R. 103.)

On the basis of this evidence and the exhibits showing Fleming's operations the Commission found that he had not abandoned service to Arkansas points after June 1, 1935. Since the finding involved the weighing of testimony in conjunction with a consideration of shipping bills and the nature of the business conducted, we think the Commission's determination should not have been disturbed by the District Court, the record disclosing support for the Commission's interpretation as much as for that of the court below.

The fact that Fleming transported no shipment to Arkansas for the period of little over a year

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[13] The question whether Fleming is entitled to an authorization from the Commission to operate to *all* points in Arkansas is not here specially discussed, as the considerations involved are identical with those suggested earlier in our brief (pp. 40–56) concerning the like question in the case of other States.

between May 12, 1935, and the date of the hearing, July 23, 1936, cannot be given the factual significance of abandonment when it is remembered that Fleming's operations are necessarily characterized by interludes in service that are dictated by the sporadic demands of consignees in a specialized line of commodity.[14]

Under the circumstances just reviewed, the District Court's reexamination and redetermination of the question of abandonment was improper.

CONCLUSION

Appellant railroads have failed to establish a right to contest judicially the order made by the Commission on Fleming's application; accordingly, the District Court ought to have dismissed their bill, for want of standing to sue. However, if this Court should decide that appellants were entitled to maintain the bill in the court below and that questions on the merits are required to be decided in this appeal, we submit that the Commission's order is supported by substantial evidence and is in accord with correct principles of law under the applicable statute. It is therefore respectfully submitted that the decree of the District Court should be reversed insofar as it sets aside and mod-

[14] This argument is developed earlier in our brief, pp. 40-56.

ifies the order and certificate of the Commission, and that it should in all other respects be affirmed.

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DECEMBER 1941.

APPENDIX

Statutes involved

Pertinent provisions of the Interstate Commerce Act important in the consideration of this case are:

Part II. "Sec. 206 (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within

one hunderd and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *."

"Sec. 208 (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory

specified in the certificate, as the development of the business and the demands of the public shall require."

Part I. "Sec. 1 (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for

such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which,

or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be lo-

cated wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

U. S. GOVERNMENT PRINTING OFFICE: 1941